UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Martin S. Gottesfeld, pro se,
Plaintiff
- against -
Hugh J. Hurwitz, et al.

Case No.: 18-cv-10836-PGG-GWG

PRELIMINARY MOTION FOR LEAVE TO FILE A SUR-REPLY

1-15-20

Plaintiff Martin S. Gottesfeld (hereinafter "plaintiff"), acting pro se, hereby moves the Honorable Court on a preliminary basis for leave to file a sur-reply memorandum to the defendants' reply (docket entry ~~[illegible]~~ (D.E.) 111) to the plaintiff's opposition (D.E. 102, 101, and 115) to the defendants' motion to dismiss (D.E. 51-52) the instant complaint (D.E. 2).

In support of this motion, the plaintiff herewith provides and moves The Honorable Court pursuant to Fed. R. Evid. 201(c)(2) to take mandatory judicial notice of Exhibit 1 hereto, Declaration of Martin S. Gottesfeld. Due to the circumstances described therein, the plaintiff ~~files~~ makes the instant filing as a preliminary motion. Should The Court determine that the instant motion lacks the required specificity or find it otherwise ~~sufficient~~ insufficient, then the unrepresented plaintiff requests that The Court provide him guidance and accept a supplemented filing.

The plaintiff first notes that the defendants seek to admit new evidence in their reply ~~brief~~ memorandum. D.E. 111 at 12, citing D.E. 112 and 112-1. Yet, "'[w]here new evidence is presented in a party's reply brief or affidavit in further support of its [] motion,

the district court shall permit the nonmoving party to respond to the new matters prior to the disposition of the motion." Kowalski v. YellowPages.com, LLC, 2012 U.S. Dist. LEXIS 46539, 10 Civ. 7318 (PGG) (S.D.N.Y. March 31, 2012) at *30, (quoting Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 945 F. Supp. 693, 708 (S.D.N.Y. 1996) (quoting Litton Indus. v. Lehmen Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1235 (S.D.N.Y. 1991), rev'd on other grounds, 967 F.2d 742 (2d Cir. 1992))). The plaintiff wishes to challenge D.E. 112 for lack of personal knowledge. Please cf. D.E. 101-1 at 31. The plaintiff also wishes to argue that D.E. 112-1 forms an insufficient legal basis to uphold the denial of his Rolling Stone interview while he was a pre-trial detainee because the vague supposed "alternative purpose" proffered by Defendant Tatum therein is a sham, especially given that Defendant Tatum allowed the SHU inmates hour-long contact visits with members of the community who were far more likely to introduce contraband or otherwise jeopardize "safety and security" than a professional journalist on assignment to cover a story for a major national publication. Please cf. D.E. 101-2 at 2

The plaintiff further notes that D.E. 112-1 is unsworn and nowhere has its author affirmed under penalty of perjury that it is true and correct. Quite frankly, Defendant Tatum was lying and he conducted no such "thorough review and evaluation." D.E. 112-1. Nowhere have the defendants provided admissible evidence that Defendant Tatum was honest in D.E. 112-1 or evidence of any "thorough review and evaluation" and the plaintiff would like to provide evidence contrary to the unsworn new assertion in D.E. 112-1.

The defendants also made new arguments in their reply that the plaintiff wishes to address. "Arguments made for the first time in a reply brief need not be considered by a court," of course. Kowalski v. YellowPages.com LLC at *30. Yet, if the Court nonetheless wishes to consider the new

arguments of the defendants, then the plaintiff notes Coffee v. City of New York, 2019 U.S. Dist. LEXIS 47304, 15 Civ. 8916 (PGG) (S.D.N.Y. March 20, 2019) at *8, "Because Plaintiff had raised his 'all rights reserved' argument for the first time in his reply, the court directed Defendants to file a sur-reply addressing the issue."

The defendants address for the first time in their reply that the instant complaint seeks "prospective injunctive relief" and introduces ~~a new topic~~ an argument of supposed mootness. D.E. 111 at 5 n. 1. The plaintiff would like to ~~refute this meritless perfidy~~ debunk this meritless perfidy on many levels. The plaintiff wishes to argue that the prospect of class certification, as contemplated in the complaint, renders the defendants' apparent favorite scenario very inevitable in the instant case. D.E. 2 at 12 ¶ 24, seeking an attorney to pursue class certification.

The plaintiff also wishes ~~to~~ to argue that limited to his own experiences since filing the instant complaint, the relevant injuries have been repeated and yet evaded review and will continue to do so.

Finally, the plaintiff wishes to introduce evidence ~~that~~ showing that even should he be released tomorrow and never again thereafter be reincarcerated, he would nonetheless obtain tangible benefits from the prospective relief he seeks and that he maintains a personal stake in the disposition of the declaratory and injunctive claims.

The defendants react to the fact that after being denied grievance forms for over a week, the plaintiff submitted BP-8s on January 20th, 2017, by arguing that, in effect, the plaintiff had ~~had~~ twenty (20) days from his initial placement in the SHU, i.e. until December 4th, 2016, to file an any issues regarding the SHU or forever waive them. This ridiculous and episodic construction is wishful thinking for the defendants and willfully blind to the nature of ongoing violations. The defendants want the Court to join their three-card monty and rule that if a prisoner doesn't object

to SHU conditions in the first twenty (20) days, then they are free to continue those conditions forever after under the sound guarantee that the prisoner can never gain access to court. The plaintiff wishes to challenge the foundation of this house of cards from multiple angles.

If D.E. 112-1 actually proves anything, it is that informal resolution was still being attempted as of December 5th, 2016. The non-admitted BP-8s show that it continued thereafter. Defendant Tatum suggested that the plaintiff and Rolling Stone communicate by mail. D.E. 112-1. (This is not to say that Defendant Tatum was honest in his (non)factual assertions on December 5th, 2016, just that he explicitly made the suggestion of using the mail.)

The BP-8s show that the plaintiff tried Defendant Tatum's suggestion and continued attempting informal resolution prior to filing a BP-8 and that was after nine (9) days to give up on obtaining a BP-8. D.E. 99 at 13, "INMATE'S COMMENTS" details the plaintiff's ongoing attempts at informal resolution, dating back to December, 2016. Id. at 14 § 3.

Further unopposed evidence of ongoing attempts at informal resolution are in the complaint itself. D.E. 2 at 9 ¶ 15 (the plaintiff invites to the attorney general "shortly after" arriving at MCC and then speaks to agents of the OIG to no avail). Please see also exhibits 142 and 144-145 to the plaintiff's opposition, also filed. The Huffington Post also attempted informal resolution on behalf of the plaintiff, D.E. 2 at 9 ¶ 16.

The plaintiff would like to introduce evidence of these ongoing attempts at informal resolution because prolonged efforts to informally resolve is one of the possible reasons allowed for late filing of a BP-9. Tyree v. Zenk, 2007 U.S. Dist. LEXIS 10148, 05CV2998 (RJD) (LB) (E.D.N.Y. February 14, 2007) at *12-13. Please see also 28 C.F.R. § 542.14(b), found at D.E. 101-6 at 25.

The plaintiff further wishes to provide evidence that he had mere hours of notice on a Saturday morning, i.e. February 4th, 2017, that he was being transferred out of MCC and that once notified, he never again saw the specific staff members with whom he could file remedies. Please see 28 C.F.R. § 542.14(c)(4), found at D.E. 101-6 at 26. This abrupt departure and the defendants' withholding of grievance forms rendered the extension provisions of 28 C.F.R. § 542.14 unavailable to the plaintiff. The key fact is not that extensions necessarily would or would not have been granted. No one can know. Rather, the key element is that the defendants rendered unavailable to the plaintiff the procedure he could have used to seek extensions, and the plaintiff wishes to introduce further evidence in response to the defendants' new arguments about his BP-8s and other attempts at informal resolution at MCC.

Further, this Court — and nearly every other — has ruled that once a prisoner achieves a favorable outcome on a grievance, he has exhausted. J.S. v. T'Kach, 2014 U.S. Dist. LEXIS 116362, 11 Civ. 103 (NRB) (S.D.N.Y. August 20, 2014). It is undisputed that the plaintiff was transferred from MCC to The Plymouth County Correctional Facility (PCCF) on Saturday, February 4th, 2017. Indeed, the plaintiff said specifically in his opposition, under the penalty of perjury; D.E. 101-1 at 9-10 (emphasis added):

"Two (2) days later, i.e. the next Saturday — during the weekend — the plaintiff received the only response he would ever get to his attempts to utilize the FBOP's administrative-remedy system and to his work on the Federal pension program. Two (2) deputy U.S. marshals arrived in the morning in a minivan and transported the plaintiff from MCC to The Plymouth County Correctional Facility (PCCF)... Rolling Stone was able to interview the plaintiff in-person at PCCF." Please see also D.E. 101-4 at 2 ¶ 7, ~~D.E.~~ Id. at 14 ¶ 13, and Id. at 15 ¶ 16.

The defendants never produced admissible evidence contradicting the factual assertions noted supra under the penalty of perjury by the plaintiff in his opposition. D.E. 101 at 8 § II(A). This includes the uncontested assertion that the plaintiff's transfer to FCCF was a response to his attempts to use administrative remedies.

The plaintiff wishes to provide evidence that the twenty-(20)-day rule argued for the first time against his BP-8's and other proofs of exhaustion ~~by~~ in the defendants' reply is inapplicable because the plaintiff also exhausted all of his informal resolutions when he achieved the favorable outcome on those issues of being transferred to a facility that isn't "fresh." D.E. 101-4 at 7 ¶9.

Finally, despite some clunky bureaucratese in the language of 28 C.F.R. § 542.14(a), the twenty-(20)-day rule applies to discrete incidents and not ongoing wrongs. Wright v. Knibbs, 2015 U.S. Dist. LEXIS 125413, 13 Civ. 2849 (ECM) (S.D.N.Y. September 16, 2015) at *25-26 ("the ~~last day~~ latest day on which [plaintiff] claimed he received inadequate medical care was..."). The plaintiff wishes to develop this argument and provide further evidence of the ongoing nature of the Constitutional deprivations at MCC.

In their reply, the defendants continued cherry-picking non-precedential out-of-district decisions despite contrary controlling case law. The plaintiff notes Exhibit 1 hereto at ¶4, and that he is unable to compile a full list. Indeed, this inability to cross-reference is one of the reasons this is a preliminary motion.

Perhaps the most striking and unprofessional instance of cherry-picking is at D.E. 111 at 6, "However, as described in Gonzalez v. Hasty, 269 F. Supp. 3d 45, 57-58 (E.D.N.Y. 2017), aff'd 755 Fed. App'x 67 (2d Cir. 2018), "... Practically speaking, this means that even where a circuit court had previously found a Bivens remedy, that court must

still consider the availability of an implied right of action in subsequent cases relying on the same precedent." (emphasis in original, double-emphasis added, and ellipses expended). It is easy to miss that "that court," supra, refers to the circuit court and not to the district court. And the proper citation supra would say "aff'd on other grounds." Please see D.E. 101-2 at 22, quoting 755 Fed. Appx. 67, 69 (2d Cir. November 14, 2018, for what the circuit court actually said on the matter. In Gonzalez v. Hasty, the Second Circuit found qualified immunity dispositive for reasons that are unavailing to the defendants in the instant case, as the plaintiff recalls.

The defendants in their reply cite to their admissions without addressing their true import. D.E. 111 at 10, citing D.E. 99 at 7. They then contradict their admissions, claiming a "Lack of Defendants' Personal Involvement," inter alia, and go on to make the misleading averment that, "Plaintiff cannot assume that [Defendants] Hunnitz and Anderson ... personally took part in decisions related to his housing." D.E. 111 at 8 and 14.

"Plaintiff" assumes no such thing. The defendants admitted it. D.E. 99 at 7, 18, 19, and 30, Request Numbers 9-10; Id. at 9, 20, 31, and 42, Request Numbers 23-27.

The defendants reply also states manifest falsehoods. Among them, that the plaintiff's opposition contains "hundreds" of exhibits. The plaintiff wishes to refute these obvious wrongs.

In closing their fifteen-(15)-page reply which followed their over-thirty-(30)-page motion and its dozens of unpublished cases & in the glaring absence of a Rule 56.1 statement, the defendants claim that without citing a single case—not even an unpublished out-of-district decision (apparently their favorite kind)—that the Court should deny the plaintiff's motion for leave to file a sur-reply because he "has

already submitted an Opposition that is well in excess of the typical length permitted by the Court's individual rules." The defendants cite to no Local Civil Rule governing page-length because there is ~~none~~ none. Nor do they cite to D.E. 9 because there is no such rule there. Exhibit 1 hereto at 248. Indeed, the plaintiff is sure that this Court regularly handles more voluminous filings in cases where—unlike this one—lives aren't on the line.

Perhaps the defendants need a reminder that a detainee remanded into the custody of Defendant Hurwitz and the successors of defendants Anderson, Tatum, and Bosscarich died awaiting trial in the MCC SHU. The significance of this death seems lost on them. Though raised explicitly in D.E. 101-2 at 35, no mention of it appears in D.E. 111.

Respectfully filed in accordance with the prison-mailbox rule of Houston v. Lack, 487 U.S. 266 (1988), by mailing to the Court in an envelope bearing sufficient affixed pre-paid first-class U.S. postage and handed to Ms. S. Wheeler of the FCI Terre Haute CMU unit team, acting in her official capacity as an agent of the defendants, on Monday, ~~December~~ January 6th, 2020, or the first opportunity thereafter,

by: MSG

Martin S. Gottesfeld, pro se

Exhibit 1

Declaration of Martin S. Gottesfeld:

I, Martin S. Gottesfeld, declare that the following is true and correct under the penalty of perjury under the laws of The United States pursuant to 28 U.S.C. § 1746(1) on this 6th day of January, 2020:

1. I am Martin S. Gottesfeld and I am the sole plaintiff in the case of Gottesfeld v. Hurwitz, et al., 18-cv-10836-PGG-GWG (herein "the case"), currently pending before The Honorable U.S. District Court for The Southern District of New York (herein "The Court").

2. On Monday, December 9th, 2019, agents of both the defendants in the case and their counsel, Mr. Alexander Hogan, Esq., interrupted me while I was typing a legal document and confiscated my legal work.

3. I have since been held by these agents in solitary confinement ~~and~~ without any administrative-detention hearing in violation of 28 C.F.R. §§ 541.26(b) and 541.26(c) (docket entry ("D.E.") 101-7 at 27), and with a single now-inapplicable administrative-detention order in violation of 28 C.F.R. § ~~541.28~~ 541.25(a), just as happened in the instant complaint (D.E. 2 at 6 ¶¶ 6-7) and again four (4) days after the defendants were process served the instant complaint (D.E. 23-25, showing service accepted by counsel on February 11th, 2019; D.E. 12-14, showing ~~solitary~~ the plaintiff's SHU placement without hearings or delivery of written orders again on February 15th, 2019; and D.E. 99 at 5, 16, 27, and 38, Request Numbers 1-58, showing that the plaintiff's unconstitutional SHU placement continued until April 1st, 2019—some ~~forty-five~~ forty-five (45) days).

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4. In the time since my latest placement in retaliatory solitary confinement by the defendants' counsel, et al., I have received through the mail new copies of some of the filings from the case, but the agents of the defendants' counsel, et al. (herein "the agents") continue to deprive me of

the defendants' motion to dismiss (D.E. 51-52) and the cacophony of frivolously-cited and manifestly- inapplicable and non-controlling unpublished decisions cited therein. Without copies of these documents for reference, I cannot compose a final motion for leave to file a sur-reply to D.E. 111.

5. The solitary-confinement cells in which I have been held since December 9th, 2019, are the first that I have seen in seven (7) institutions that have no desk and chair for composing legal documents. This violates 28 C.F.R. § 541.31 (D.E. 101-5 at 40) and 28 C.F.R. § 543.11(j), and greatly limits my capacity to litigate. Along with the other factors detailed herein, this prevents me from composing a final motion for leave to intervene.

6. The agents deny me all access to a typewriter in violation of 28 C.F.R. §§ 541.11(a), (i), and (j), and further violation of 541.31(c) - not to mention at great inconvenience to myself and The Court.

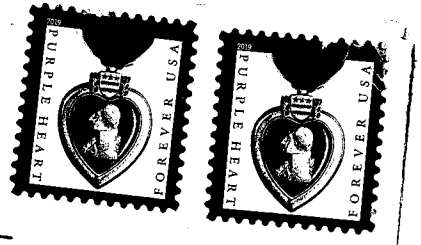
7. The agents at first greatly reduced my law-library access and now they retaliate when I leave my cell, which eliminates my access entirely. I am unable to look up further case law, statutes, rules, and regulations.

8. Before I filed my opposition memorandum (D.E. 101), I checked the Local Civil Rules and the individual practices of The Honorable Paul G. Gardephe as they appear in D.E. 9 for rules governing page length and I found none.

I declare under the penalty of perjury under the laws of The United States that the foregoing is true and correct. Executed on Monday, January 6th, 2020.

by: MSG
Martin S. Gottesfeld

NAME: Martin S. Gottesfeld
NUMBER: 12982-104
Federal Correctional Institution
P.O. Box 33
Terre Haute, IN 47808



Monday, January 6th 2020,
Houston v. Lack, 487 U.S. 266 (1988)

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